

Appl. No. 10/674,669
Docket No. 8598MR
Amdt. dated May 16, 2007
Reply to Office Action mailed on February 16, 2007
Customer No. 27752

REMARKS

FORMAL MATTERS

DOUBLE PATENTING REJECTION

Claims 1, 9 and 15 have been provisionally rejected under the judicially created doctrine of obviousness-type double patenting over Claims 13-22 of U.S. Patent No. 7,048,842. The Office states that although the allegedly conflicting claims are not identical, they are not patentably distinct from each other because both are directed to similar subject matter.

Although Applicants believe their invention to be patentably distinct from the Claims of 7,048,842, Applicants wish to simplify the issues in the present application by concurrently submitting with this response the appropriate terminal disclaimer over the cited patent. In submitting this terminal disclaimer, Applicants state for the record that the terminal disclaimer is not an admission of obviousness. In fact, the Federal Circuit has held that:

[T]he filing of a terminal disclaimer "simply serves the statutory function of removing the rejection of double patenting, and raises neither presumption nor estoppel on the merits of the rejection." *Quad Env'tl. Techs. Corp. v. Union San. Dist.*, 20USPQ2d 1392 (Fed. Cir. 1991).

Applicants therefore submit that the obviousness-type double patenting rejection of Claims 1, 9 and 15 have been overcome. Reconsideration and withdrawal of the double patenting rejection is respectfully requested.

Claims 1-8 have also been provisionally rejected under the judicially created doctrine of obviousness-type double patenting over Claims 1, 26-32, 57-62, 63, and 87-93 of copending U.S. App. No. 10/027,667 in view of DE 100 17 407. The Office states that although the conflicting claims are not identical, they are not patentably distinct from each other because the cited claims teaches an electrolytic apparatus that is structurally similar to that of the instant invention. The Office admits, however, that U.S. App. No. 10/027,667 does not explicitly teach the connection between the electrolytic cell and the appliance. Applicants submit that "[w]hen two patents claim different statutory classes of subject matter, composition, and process, they are not directed to the same invention.

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This alone is sufficient to avoid same-invention type double patenting. Before two sets of claims may be said to claim the same invention, they must in fact claim the same subject matter. By same invention is meant identical subject matter. Thus, the invention defined by a claim reciting ‘halogen’ is not the same as that defined by a claim reciting ‘chlorine,’ because the former is broader than the latter. A good test, and probably the only objective test, for ‘same invention,’ is whether one of the claims would be literally infringed without literally infringing the other. If it could be, the claims do not define identically the same invention.” *Studiengesellschaft Kohle mbH v. Northern Petrochemical Co.*, 784 F.2d 351, 228 USPQ 837 (Fed. Cir. 1986). Since the two inventions are not identical and rather is being subjected to an obviousness rejection that Applicants overcome via their arguments and amendments, included herein, the obviousness-type double patenting rejection is found to be inappropriate. Furthermore, the presently amended claims would not literally infringe the claims of the co-pending application, particularly in view of the admission by the Office. Therefore, Applicants respectfully request reconsideration and withdrawal of the rejection of claims 1-8 under such double patenting grounds.

REJECTIONS UNDER 35 USC §112

Claims 1-15 have been rejected under 35 USC §112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. In light of the amendments, the rejection is now moot. Accordingly, withdrawal of said rejection is respectfully requested.

ART REJECTIONS

REJECTIONS UNDER 35 USC §102

Claim 1 has been rejected under 35 USC §102(a) as being unpatentable over US 6,306,281 to Kelley (hereinafter “Kelley”) for the reasons set forth in the record.
Applicants respectfully traverse this rejection.

Applicants have amended Claim 1 and therefore believe the rejection to now be moot. Kelley fails to teach or suggest Applicant’s Halogen dioxide generating system, as amended, particularly, wherein the electric current supply comprises a battery, batteries, solar power, and mixtures thereof. In fact, Kelley only discloses the use of a D.C. power

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source and therefore, fails to provide the electric source at the voltage potential addressed by the source supply provided by Applicants' invention. Kelley would not be able to provide the means for providing a safe method and apparatus for manufacturing a halogen dioxide to meet to wide variety of uses provided by the present claims. Applicants respectfully submit that anticipation can only be established when a single prior art reference discloses, expressly or under principles of inherency, each and every element of a claimed invention. *RCA Corp. v. Applied Digital Data Sys., Inc.* 221 USPQ 385, 388 (Fed. Cir. 1984). Thus, there must be no difference between the claimed invention and the disclosure relied upon as anticipatory, as viewed by a person of ordinary skill in the field of the invention. *Scripps Clinic & Res. Found. v. Genentech Inc.*, 927 F2d 565, 18 USPQ2d 1001 (CAFC 1991).

For the foregoing reasons, Applicants respectfully request reconsideration and withdrawal of the rejection of claim 1 as being anticipated by Kelley.

REJECTIONS UNDER 35 USC §103

Claim 2 has been rejected under 35 USC §103(a) as being unpatentable over Kelley in view of Spence US 4,414,070 (hereinafter "Spence"). Claims 3-5 and 7-8 have been rejected under 35 USC §103(a) as being unpatentable over Kelley in view of Kaczur et al., US 5,106,465 (hereinafter "Kaczur"). Claim 6 has been rejected under 35 USC §103(a) as being unpatentable over Kelley in view of Kaczur and further in view of DE'407. Claims 9-15 have been rejected under 35 USC §103(a) as being unpatentable over Kelley in view of Zappi et al., US 6,328,875 (hereinafter "Zappi") and further in view of Cowley et al, US 5,965,004 (hereinafter "Cowley"). The Office has set forth the reasoning of such rejections in the Office Action dated February 16, 2007. Applicants respectfully traverse all of the foregoing rejections.

In light of the amendments, Applicants believe all of the rejections under 35 USC §103(a) to be moot. Furthermore, none of the cited references fail to rectify the foregoing shortcomings of Kelley and therefore does not further obviate the instant claims. Since it has been established that Kelley is not properly applied in the suggested context, Applicants believe that there is no need to address the propriety of the application of Spence, Kaczur, DE'407, Zappi or Cowley as secondary references.

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Based upon the foregoing, Applicants respectfully request withdrawal of claim 2-15 under 35 USC §103 as set forth in the record.

CONCLUSION

In view of the above, Applicants respectfully submit that each of the issues raised by the Office Action has been addressed. Reconsideration and allowance of each of the pending claims is respectfully requested.

Respectfully Submitted,
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